BILLING CODE: 3510-DS-P

DEPARTMENT OF COMMERCE

INTERNATIONAL TRADE ADMINISTRATION

Separate-Rates Practice in Antidumping Proceedings involving Non-Market Economy Countries.

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Request for Comments

SUMMARY: On May 3, 2004, the Department of Commerce published a notice in the Federal Register requesting comments on its separate rates practice. This practice refers to the Department's long-standing policy in antidumping proceedings of presuming that all firms within a non-market economy country ("NME") are subject to government control and thus should all be assigned a single, country-wide rate unless a respondent can demonstrate an absence of both *de jure* and *de facto* control over its export activities. In that case, the Department assigns the respondent its own individually calculated rate or, in the case of a non-investigated or non-reviewed firm, a weighted-average of the rates of the fully analyzed companies, excluding any rates that were zero, *de minimis*, or based entirely on facts available. In response to its May 3, 2004, request for comments on its separate rates policy and practice and on its options for changes (69 FR 24119), the Department received 23 submissions from interested parties.

Taking into account the submissions in response to its first notice requesting comments on various changes to its separate rates policy and practice, this notice outlines revised options for such changes in order to provide the public with an opportunity to comment on whether those changes would be consistent with the statute and would redress problems that have been identified concerning

separate rates appropriately. The Department intends to consider additional modifications to its NME practice and may solicit additional public comment on other potential changes, as appropriate.

DATES: Comments must be submitted by October 15, 2004.

ADDRESSES: Written comments (original and six copies) should be sent to James J. Jochum, Assistant Secretary for Import Administration, U.S. Department of Commerce, Central Records Unit, Room 1870, Pennsylvania Avenue and 14th Street NW, Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Lawrence Norton, Economist, or Anthony Hill, Senior International Economist, Office of Policy, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC, 20230, 202-482-1579 or 202-482-1843.

SUPPLEMENTARY INFORMATION:

Background

In an NME antidumping proceeding, the Department presumes that all companies within the country are subject to governmental control and should be assigned a single antidumping duty rate unless an exporter demonstrates the absence of both *de jure* and *de facto* governmental control over its export activities. See Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China, 61 FR 19026, 19027 (April 30, 1996). The Department's separate rates test is not concerned, in general, with macroeconomic border-type controls (*e.g.*, export licenses, quotas, and minimum export prices), particularly if these controls are imposed to prevent the dumping of merchandise in the United States. Rather, the test focuses on controls over the decision-making process on export-related investment, pricing, and output decisions at the individual firm level. See

Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Ukraine, 62 FR 61754, 61757 (November 19, 1997); Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 62 FR 61276, 61279 (November 17, 1997); and Preliminary Determination of Sales at Less Than Fair Value: Honey from the People's Republic of China, 60 FR 14725, 14727 (March 20, 1995).

To establish whether a firm is sufficiently independent from government control in its export activities to be entitled to a separate rate, the Department analyzes each exporting entity under a test arising from the Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 FR 20588 (May 6, 1991), as modified in the Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China, 59 FR 22585, 22587 (May 2, 1994) (Silicon Carbide). Under this test, the Department assigns separate rates in NME cases only if an exporter can demonstrate the absence of both *de jure* and *de facto* governmental control over its export activities. See Silicon Carbide and Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China, 60 FR 22544, 22545 (May 8, 1995). In order to request and qualify for a separate rate, a company must have exported the subject merchandise to the United States during the period of investigation or review, and it must provide information responsive to the following considerations:

1. Absence of *De Jure* Control: The Department considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments

decentralizing control of companies; and (3) any other formal measures by the government decentralizing control of companies.

2. Absence of *De Facto* Control: Typically, the Department considers four factors in evaluating whether each respondent is subject to *de facto* governmental control of its export functions: (1) whether the export prices are set by, or subject to the approval of, a governmental authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the central, provincial, or local governments in making decisions regarding the selection of its management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses.

In an antidumping investigation or review, the Department will usually assign a weighted-average of the individually calculated rates, excluding any rates that were zero, *de minimis*, or based entirely on facts available, to exporters who have not been selected as mandatory respondents if they fulfill two requirements. First, they must submit a request for separate rates treatment, along with a timely response to section A of the Department's questionnaire. Second, the Department must determine, after reviewing the requesting companies' submissions, that separate rates treatment is warranted. See Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Carbon-Quality Steel Pipe from the People's Republic of China, 67 FR 36570, 36571 (May 24, 2002).

As it announced in its May 3, 2004, notice in the *Federal Register* (69 FR 24119), the Department is considering changes to the practice detailed above, in particular in response to the

growing administrative burden of analyzing requests for separate rates. The Department has received increasing numbers of requests for separate rates in recent years and is facing an exceptionally large number of such requests in two ongoing investigations. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Wooden Bedroom Furniture from the People's Republic of China, 69 FR 35312 (June 24, 2004), Notice of Preliminary Determination of Sales at Less Than Fair Value, Partial Affirmative Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China, 69 FR 42654 (July 16, 2004), and Notice of Preliminary Determination of Sales at Less Than Fair Value, Negative Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam, 69 FR 42672 (July 16, 2004). Despite the administrative burden, the Department has analyzed the large number of separate rates requests in these cases. Nevertheless, there are concerns that processing these requests consumes an inordinate amount of the Department's resources. One particular concern which the Department faces is the complaint that parties responding to the Department's questionnaire have, in many cases, not responded fully to the initial request for information, forcing the Department to issue numerous supplemental questionnaires, which, again, create an administrative burden on the agency. Further, as noted by various parties submitting responses to the Department's May 3, 2004 notice on its separate rates policy and practice, the separate rates test, as currently constructed, may not offer the most effective means of determining whether exporters act, *de facto*, independently of the government in their export activities.

Another issue that has been raised by parties concerns potential evasion of duties. Under

current practice, separate rates are assigned only to exporters, and the assigned rate applies regardless of which entity produces the subject merchandise. In cases where the rates vary widely from exporter to exporter, there is a strong incentive for exporters assigned either the country-wide rate or a high calculated rate to ship their merchandise through an exporter assigned a lower rate. Such diversion arguably undermines the effect of other antidumping or countervailing duty margins the Department calculates.

In order to address these concerns, the Department is now considering an additional set of options, set forth in the Appendix to this notice, and is particularly interested in comments relating to these possible approaches, including comments on their consistency with the statute and regulations.

Comments

Persons wishing to comment should file a signed original and six copies of each set of comments by the date specified above. The Department will consider all comments received before the close of the comment period. Consideration of comments received after the end of the comment period cannot be assured. The Department will not accept comments accompanied by a request that a part or all of the material be treated confidentially because of its business proprietary nature or for any other reason. The Department will return such comments and materials to the persons submitting the comments and will not consider them in development of any changes to its practice. All comments responding to this notice will be a matter of public record and will be available for public inspection and copying at Import Administration's Central Records Unit, Room B-099, between the hours of 8:30 a.m. and 5 p.m. on business days. The Department requires that comments be submitted in written form. The Department

recommends submission of comments in electronic form to accompany the required paper copies. Comments filed in electronic form should be submitted either by e-mail to the webmaster below, or on CD-ROM as comments submitted on diskettes are likely to be damaged by postal radiation treatment.

Comments received in electronic form will be made available to the public in Portable Document Format (PDF) on the Internet at the Import Administration Web site at the following address: *http://ia.ita.doc.gov/.*

Any questions concerning file formatting, document conversion, access on the Internet, or other electronic filing issues should be addressed to Andrew Lee Beller, Import Administration Webmaster, at (202) 482-0866, email address: *webmaster-support@ita.doc.gov.*

_____

James J. Jochum
Assistant Secretary
for Import Administration

_____

Date

Appendix

(1) The Department is considering a change in its separate rates process from a Section A response process to an application process. The goal of the separate rates application would be to both streamline the separate rates process for NME exporters and the Department and to focus the analysis on those issues most relevant to separate rate eligibility. For example, in such an application, all exporters, including those that are 100% foreign-owned, would be required to certify their eligibility for separate rates (*i.e.*, to certify that they exported subject merchandise to the United States and that they operate *de jure* and *de facto* independently of the government), as well as to potentially identify any affiliates involved in the production or sale of the subject merchandise and the producers from whom they sourced the merchandise during the period of investigation. The Department would also list the documents required to substantiate these certifications and require that the applicant provide original and translated copies of all those documents with the application. The Department would not consider any application for separate rate eligibility unless all of the necessary fields of the application were completed and the required evidence and certifications were submitted. Moreover, the Department would continue to reserve the right to issue supplemental questionnaires and verify applicants if necessary.

Through this streamlined and more focused separate rates application process, the Department could conserve resources by receiving and reviewing only the information most relevant to separate rate eligibility, such as an exporter's independence over its own export activities and the potential influence, direct or indirect, of affiliated parties over the exporter's sales and production activities. Moreover, in the application, the Department could ask questions not addressed currently by its standard NME

Section A questionnaire that are pertinent to separate rates eligibility, including questions about provincial or local government control over exporters. Such an application system could streamline the process of applying for a separate rate and provide a procedure which is less demanding of the Department's resources and time. To streamline the process further, the application would be available as a form on the Import Administration website. After a transition period, the Department would require that parties complete and submit this form electronically on the Import Administration website. The Department welcomes comments on the general advisability of introducing an application process for separate rates, as well on the specific proposal outlined above.

2) Under current NME practice, the Department assigns exporter-specific separate rates, and not exporter-producer combination rates, with three exceptions. The first exception concerns exclusions, in which case the exporter that is excluded receives an exporter-producer combination rate so that the exclusion from the antidumping order only applies when the exporter sources from the same supplier as in the original investigation. See Sections 733(b)(3) and 735(a)(4) of the Tariff Act of 1930, as amended, and 19 CFR 351.107(b)(1). The second exception involves the Department's enforcement of the law as it relates to middleman dumping. When a producer/exporter sells to an unaffiliated middleman with the knowledge of the ultimate destination of the merchandise, and that middleman subsequently sells merchandise to the United States at less than fair value, the Department will calculate a combination antidumping duty rate for the producer/exporter and middleman in many cases. The third exception concerns the Department's policy on new shipper reviews, where the rate is assigned to the exporter-producer combination. See Import Administration Policy Bulletin 03.2: Combination Rates in New Shipper Reviews, dated March 04, 2003. The Department is considering extending this

practice of assigning exporter-producer combination rates to NME exporters receiving a separate rate so that only the specific exporter-producer combination that existed during the period of investigation or review receives the calculated rate for establishing the cash deposit rate for estimated antidumping duties. That is, if an exporter qualifying for a separate rate during an investigation sourced its subject merchandise from three producers during the period of investigation, the separate rate it receives would only apply as a cash deposit to merchandise produced by any of the three suppliers that had supplied the exporter during the period of investigation. While the exporter would be free to adjust its sourcing from among the three suppliers that supplied it during the investigation, merchandise sourced from new suppliers would fall outside the combination rate. This combination rate would change as the result of subsequent administrative reviews establishing changes to the sourcing of the subject merchandise provided to the exporter. However, for cash deposit purposes, these combination rates would apply until the next administrative review.

The Department welcomes comments on the legal and administrative advisability of combination rates and, if instituted, how best to construct them. In particular, the Department is interested in comments as to what rate it should assign to exporters' merchandise from suppliers for which the Department has not established a combination rate.

3) The Department is also considering changing its policy and practice concerning third-country resellers, *i.e.*, when NME producers sell subject merchandise through exporters located outside the NME country (for example, Hong Kong, Taiwan, or Malaysia). Under current practice, the Department applies a knowledge test to determine the entity to which the rate applies, only where there is evidence that the producer knows that the ultimate destination of the merchandise is the United States

does the Department apply a rate to the NME producer. Otherwise, the Department considers the third-country reseller to be the exporter and assigns it an antidumping duty rate.

Recent antidumping investigations indicate that the relationship between Chinese producers, in particular, and resellers outside China can be complex and difficult to assess given the limited resources of the Department. Therefore, the Department is considering instituting a rebuttable presumption that NME producers shipping subject merchandise through third countries are aware that their goods are bound for the United States. In other words, the Department would assume that NME producers shipping through third countries set the export price to the United States and assign to them, and not the reseller, antidumping duty rates, unless evidence were presented to the contrary. In accordance with standard practice, the NME producer/exporter would be required to demonstrate lack of *de facto* and *de jure* government control in order to receive a separate rate. The Department is interested in comments as to whether there are grounds for such a rebuttable presumption.